UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HIGHWAY ROAD AND STREET
CONSTRUCTION LABORERS LOCAL 1010,
LABORERS INTERNATIONAL UNION OF
NORTH AMERICA (LIUNA), AFL-CIO,

Charged Party,

And

Case No. 29-CD-203385

NEW YORK PAVING, INC.,

Charging Party,

And

LOCAL LODGE CC175 INTERNATIONAL
ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS, AFL-CIO,

Interested Party.

BRIEF OF INTERESTED PARTY
LOCAL LODGE CC 175
IAM & AEROSPACE WORKERS, AFL-CIO

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TABLE OF CONTENTS

TABLE OF CITATIONS

NLRB Unfair Labor Practice Cases Referenced

1. INTRODUCTION

The Parties to this dispute are (i) Local Lodge CC 175, International Association of Machinists & Aerospace Workers, AFL-CIO, the successor in interest to United Plant and Production Workers, Local 175, IUJAT, (herein referred to as "Local 175" or "175")(the Interested Party) and (ii) New York Paving, Inc., (herein referred to as "NYP"), the Employer that filed the Section 8b(4)(D) charge alleging that a threat was made by the Charged Party, (iii) Highway Road and Street Construction Laborers Local 1010, (LIUNA) AFL-CIO, (herein referred to as "Local 1010" or "1010"); that 1010 would "take any and all actions necessary to protect its members' rights to continue to perform the work in question including picketing and work stoppages." (Jt. Exh. 4)

History of the Parties and Certifications:

NYP is a company that performs utility paving work for Utility companies, including gas and electric utilities, National Grid and Consolidated Edison. Prior to October 2007 NYP had collective agreements with LIUNA Local 1010 for Concrete work and with LIUNA Local 1018 for asphalt paving work. In October 2007 a Board election was held that resulted in Local 175 becoming the Certified Bargaining Representative of

> **"all full-time and regular part time workers who primarily perform *asphalt paving*, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, *landscape planting* and maintenance/fence installers, play equipment/safety installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators employed by the Employer, who work primarily in the five boroughs of New York City." (Jt. Exh. 3)**

The Certification specifically excluded persons who primarily performed the laying of concrete, concrete curb settling work or block work or members of Local 1010. (Id.) From then on 175 members performed all work that was in any manner related to work with and on Asphalt roads, walkways or road restoration, including but not limited to the laying of binder to support the roadway, milling of asphalt and temporary and final paving of the roads that were affected by the installation or repair of gas and electric lines laid in the streets. (Tr. p. 42, 224-225, 502-504, 600, 679)

For all eternity at NYP, members of either Local 1018, or the newly certified union, 175, performed the dig up (excavation) work related to road restoration after the utility company itself performed the placement or repair of the utilities' lines. Commensurately, Local 1010 members performed the ripping up of; and restorations related to; concrete sidewalks and curbs (and bus stops that protruded into the road) because that work involved almost exclusively concrete.[1]

2. The Work In Dispute:

In 2016 the City of New York determined that it wanted to change the method of restoring the roads in the City. Previously, the utility companies

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[1] In or about January, 2006 Local 1010 received a Certification from the Board in Case No. 29 RC 10880 which covered a unit of "All full-time and regular part-time site and grounds improvement, utility, paving & road building workers *who primarily perform the laying of concrete, concrete curb setting, or block work*

were permitted to restore the roadbed by filling the holes or trenches created when Utilities repaired or installed new gas or electric lines with only binder asphalt and finish asphalt on top of it. The Utility would leave a trench or hole of varying sizes and lengths in the road approximately 12-16 inches deep and Local 175 members would come and fill the hole with binder and then finish pave over it.[2] This was called "one step" paving. Previously, for years, in many circumstances, such as in peoples driveways, streets in the Bronx, and elsewhere, the hole or trench was back filled with dirt and covered with a form of asphalt called "Cold Patch" to make the area safe.

In 2016 New York City mandated new rules related to the restoration of roads where Utility companies had dug up the streets. When the Utilities finished their work they would back fill the trenches and holes with dirt and cover them with a form of asphalt known as cold patch; and later restore the road. The City was now requiring that when the hole was "dug up" to prepare the road for restoration that it now had to be saw "cut back" a certain distance to either square it off or make the hole look like a rectangle. To prepare the road for restoration a "dig up" would occur where the cold patch would be removed and the dirt and debris created by the "cut back" dug up; creating a hole in the road of varying sizes approximately 12-14 inches deep. The City's new rule mandated that effective April 1, 2017 the holes/trenches would have to have a concrete

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[2] Neither Binder work nor finish paving work is disputed. (Tr. P. 616-617, 732-733, Board Exh. (3). Dig Outs and Dig Ups refer to the same work or function.

base of about 9 inches placed in them; covered by asphalt binder and finish asphalt; rather than having all asphalt being placed in the hole to restore the road. (Er. Exh. 1)

Historically, at NYP, 175 asphalt crews performed all the dig outs. And with this change between October 2016 and April 1, 2017, Local 175 members continued to perform, as they always did, the discrete work of digging up the cold patch and removing the dirt fill and debris created by a modest cut back of the hole previously required. After the dig up work was performed the Local 175 asphalt crews continued to place asphalt binder or asphalt into the hole and finish pave.[3]

During this time Local 175 members exclusively continued to perform the dig ups, utilizing a backhoe, with small equipment such as jackhammers, shovels and picks. Local 175 Dig Up Crews were usually comprised of three workers. (Tr. p. 234, 248) One worker was usually a foreman who ran the backhoe, with the others alternating digging up the cold patch and dirt placed in and on the hole by the Utility. A separate asphalt paving crew of about 4 workers would follow shortly thereafter to place asphalt into the dug up hole and finish asphalt paving the hole.

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[3] The parties stipulated to the fact that references to dig-up work, dig-out work and excavation work are all terms that mean the same thing. (Tr. P. 733) The dig up work in question throughout the hearing involved the work to prepare the hole or trench for final restoration; eg., to dig down about 12-14 inches, fill the hole with either asphalt or concrete, and then place asphalt binder and finish pave.

On April 1, 2017 the City of New York now required that after the hole or trench was "dug up" in preparation for the road bed to be restored;[4] that nine inches of Concrete should be placed in the hole with the final 3 or more inches to consist of binder and then topped with finish asphalt. (See Employer Ex. 1) The City also now required that each hole be either squared off or made into a rectangle. This was called a full depth "cut back" and required saw cutting of up to a foot or so outside the hole which cut thru the asphalt and the concrete base of the road.

That new step required the use of a saw cutting machine to cut thru the top of the road and also thru the concrete that might be under the asphalt. Historically thru the years, when there was saw cutting needed the saw cut crew consisted of one 1010 member and one 1018, or subsequently one 175 member. The work was shared because the process invariably involved both asphalt and concrete. Normally saw cutting was performed a day or so before any hole was to be dug up. The saw cut crew was not part of the dig up or paving crews. In 2011 the amount of saw cutting in the streets that was required became minimal; and apparently was mainly conducted on sidewalks consisting of concrete; so the sharing of saw cutting ceased. But as of April 2017 every Utility hole or trench cut open in the City of New York now had to be saw cut to perform the required Cut Backs for restoration of the road—and now once again there was lots of saw cutting needed. Historically, street saw cutting was shared work.

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[4] Restoration of the road is the process of returning the street to its former self. (Tr. P. 950)

It is not in dispute that the pouring of concrete into the hole or trench is work that belongs jurisdictionally to 1010 members. Just as there is not a dispute that the binder and asphalt paving work belongs jurisdictionally to 175 members. (Tr. p. 616-617, Board. Exh. 3) The real dispute is over the assignment of the initial saw cutting for cutbacks to only 1010 members, (when these crews are assigned separately and work separately from the dig up crew, the concrete pouring and the binder/finish paving work; and could easily be assigned to members of both unions as in the past). Further, NYP, in its wisdom, decided that since asphalt was no longer the principal substance required to be placed into the hole or trench that the entire process of digging up the holes should also be given to 1010 members, in addition to the saw cutting of the street and the placement of concrete into the hole. [5]

The functional process of dig ups and the subsequent pouring of concrete into the hole is separate. Local 1010 crews who are now performing dig ups consist of approximately 5-9 workers, not the 3 workers that made up a 175 dig up crew. Local 1010 crews perform the dig up of a hole first (using one person operating a backhoe and four workers digging up the dirt and broken concrete which exists as a result of the cut back being saw cut.) When the dirt is removed from the hole, that part of the crew moves forward to the next hole on their "ticket" given to them in

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[5] Previously, the depth of the hole, some 12-14 inches, would be filled entirely with asphalt. Now, it would be filled with 9 inches of concrete, then three or more inches of asphalt binder, and then paved with 2 or 3 inches of finish asphalt.

the morning.[6] Left behind are two (2) workers who are either mixing the concrete to pour into the hole; or who are waiting for a concrete truck to appear at the location. Those two individuals can be and should be 1010 members. The dig up work can easily be assigned to 175 members, consistent with past practice. Once the hole has been dug up and concrete poured into the hole, a totally separate asphalt binder and paving crew appears; having waited the requisite time to pass to allow the quick setting concrete to harden.

Other work in dispute involves the clean up of the restored area. Clean up work basically consists of initially placing barricades, signs, cones and other safety materials on the street or sidewalks where the work is to begin; and of removing whatever was placed out on the road/sidewalk when the work was finished. Although the testimony at the hearing was consistent in saying each union cleans up its own work; there was some testimony that 1010 members were being assigned clean up work at the end of asphalt paving jobs. But generally there was no dispute as to who the work should be assigned to—its just that NYP sometimes failed to honor the two unions' understanding that each union cleaned up their own work.

Seed and Sod work is the final work that is disputed. Historically that work was also shared. (Tr. p. 591) Local 175 foreman, along with 1010

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[6] Dig up "tickets" are separate from other tickets, such as sidewalk work. (Tr. p. 539-540) The ticket provides the locations of the holes to be dug up. It was acknowledged that a "dig out" crew is a separate crew from a larger sidewalk crew. (Tr. p. 507)

members, were assigned in the past to that work where the Utility dug up a persons grass between the street and the persons home or apartment building. Although NYP apparently stopped sharing that work years ago between the unions there is no reason given as to why the work sharing could not continue since both unions have landscape planting in their Certifications.

3. There is No Reasonable Cause to Believe that Section 8(b)(4)(D) Was Violated.

Before the Board may proceed with the determination of a dispute pursuant to Section 10(k) of the Act it must be satisfied that there is a reasonable cause to believe that Section 8(b)(4)(D) has been violated. (See *Local Union No. 2592, Lumber and Sawmill Workers Union AFL-CIO and Louisiana-Pacific Corporation and Westfall Stevedore Company and International Longshoremen's and Warehousemen's Union, Local No 14, 268 NLRB NBo. 10 (1983)); Teamsters Local 174 (Airborne Express), 340 NLRB 137, 138 (2003)*

This Unfair Labor Practice is predicated on the assumption that Local 1010 threatened NYP with a job action if NYP assigned dig up, saw cutting and clean up work to members of 175. The alleged threat came only after Local 175 filed a work preservation grievance on May 3, 2017 under its collective agreement against NYP for having taken the dig up work away from 175 members; and for NYP not sharing, as it had in the past the newly instituted saw cut work with 175 members. (Jt. Exh. 6) The grievance also

alleged that in contravention of the practice that each union placed and removed barricades and cones used in their own work that some clean up work after asphalt paving had been assigned to 1010 members as well.

Before the grievance proceeded to hearing, NYP filed the 8(b)(4)(D) charge alleging that a threat had been made by 1010 against it if NYP actually gave any of that work to 175 members. NYP produced a letter written by 1010's attorney assertedly at the insistence of their client.[7] The letter was addressed, not to NYP directly, but to their attorney, Jonathan Farrell, Esq.. (Joint Exh. 4) What is especially curious is that no one at NYP who testified had ever heard of any 1010 threat; nor seen the letter from 1010's lawyer; (Tr. P 163, 391, 585, 595, 597) and neither did members of the 1010 Executive Board who were employed at NYP. (Tr. P. 254-261) Nor did they speak to Keith Loscalzo, Local 1010's Business Manager. (Tr. P. 261) about a threat. It was not a topic of discussion at their Executive Board meetings. Also, Local 175 workers at NYP never heard of the threat. (Tr. 391)

Lowell Barton, Vice President of 1010 and its Director of Organizing and Executive Board member, testified that when they learned that 175 had filed a grievance his Business Manager, Keith Loscalzo, and he discussed it briefly. (Tr. P 762) He stated that they "had our attorneys write to New York Paving to let them know that the work in question

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[7] The letter, dated July 25, 2017, was written months after the May 3, 2017 grievance letter submitted to arbitration by 175 and did not specify what work Local 1010 was afraid that NYP might be required to assign to 175 members. (See, Jt. Exh. 4)

belonged to Local 1010, and that we would do everything necessary to protect it" (Tr. 764)

What is clear from the testimony is that the President of Local 1010, Joseph Sarro, is married to Diane Bartone Sarro. (Tr. P. 262, 376, 583) She is one of 5 owners of NYP (Tr. P 425-426, 584-585). Her Brother Anthony Bartone is President of NYP. Her other brother, Joe Bartone, deceased, was another owner, with his share most likely devolving to his wife and children. Diane Bartone Sarro signs the employees' checks along with Anthony Bartone and Melissa Bartone; (Tr. P. 551) and directly works in the business of NYP. (Tr. P. 376) Joe Sarro, President of 1010 is the Brother in Law of Anthony Bartone, owner and President of NYP. Numerous Bartones and Sarros are employed as workers at NYP. The fact is it is highly unlikely that the President of Local 1010 would actually call a strike or job action; or even make an honest threat; when his wife and brothers-in-law own the company; where Joe Sarro's own brothers and relatives work there as well. (Frank Sarro,Tr. p. 316, 348, 490; Louie Sarro, Tr. p. 539, 550; Jonathan Sarro Tr. p. 474)

Moreover, it came out in the testimony of Peter Micelli, NYP's Operations Manager, that NYP operates an entity known as Di-Jo Construction. Di-Jo's non union employees are now placed on NYP dig up crews to work and for training. Micelli testified that after three weeks, if they show they can do the work, they are placed into the union. (Tr. P. 618-620) This arrangement violates the 1010 contract and appears to be

contrary to 1010's providing workers to firms from their out of work or referral list, (Tr. P 760, Jt. Exh 1A, Article III,Section 4), but helps 1010 in that NYP is training workers for the union. (Tr. P. 618-620). Why would Local 1010 want to stop that kind of help that NYP is giving them in both finding and training workers to perform dig ups?

Because 1010 was concerned that the Board may take those facts into consideration, Lowell Barton stated that between the hearings in this case of October 2 and October 10, 2017; he felt constrained to go to NYP and threaten them that a job action would occur if NYP gave any of this work to 175 members. (Tr. P. 766) He testified that he had heard 175 and NYP were coming to a "deal" to give 175 a portion of the dig up work and he went down to NYP and claims to have reminded them that they would have a job action if that is what they did. (Id.) However, his testimony once again lacked specificity in that he did not identify to whom he spoke. No one from NYP testified that they had received the verbal threat or the written one for that matter.

The fact is NYP did not want the grievance to progress to arbitration. So they concocted this ploy with 1010 to be able to file an 8(b)(4)(D). In reality, the alleged threat was simply a means to an end, for the Bartone family to avoid arbitration pursuant to the 175 collective agreement because they knew what the facts were about the assignment of the work.[8]

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[8] Barton had heard somehow that NYP was willing to guarantee 175 a certain amount of dig up work, and thus members working. The "deal" desired by NYP had

4. The Contentions of the Parties:

Dig Ups:

Dig Ups are defined as removal of cold patch asphalt placed over a hole created by the Utility, removal of dirt that was placed in the hole by the Utility down to a depth of about 12-14 inches; removal of asphalt and concrete debris caused by any cut back; making the hole ready for base to be placed into the hole—whether the base is asphalt or concrete. The work related to a Dig Up has never really changed over the years, (except that the cut backs prior to 10/1/16 were only a few inches deep (Tr. p. 333) and afterward they were full depth thru asphalt and concrete.) (Compare, Tr. p. 70-75 to 76-79; 112-115, 164, 647-648, 654, 648-650) It is considered work in preparation to restore a street to its original status. (Tr. p.648) And prior to April 1, 2017, members of 175 performed all the dig outs at NYP, whatever or wherever they were performed, since it was Certified.

NYP contends that because a portion of the base going into the hole is now concrete along with asphalt binder and finish asphalt, instead of all asphalt, the separate "dig up" function described above should also go to 1010 workers. (Tr. p. 114-115) The basis for that position is simply that Pete Miceli, the NYP Operations Manager, believes it would be too difficult for him to place two 1010 men on a 175 dig up crew to pour concrete into a hole so that the 1010 concrete jurisdiction can be honored. The preference of not having to be concerned with composition of crews was simply the

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one condition. That 175 get 5 of their members to switch their books to 1010 so that NYP could do asphalt paving for Consolidated Edison. 175 refused the request.

basis for the decision. (Tr. p. 632) It was also probably predicated on the fact that NYP wants to eliminate 175 from its premises. (Tr. p. 582). This position is supported by the following facts.

Miceli specifically says that it would be better for NYP if in addition to 1010 doing the dig-ups that 1010 could do the "topping," meaning he would like to give all the asphalt work to 1010. And 1010 and NYP tried to achieve just that desire last April, 2017 when Local 1010 filed an Election Petition for the exact bargaining unit for which 175 is certified. But their apparent plan was foiled when NYP was caught soliciting 175 members to sign 1010 authorization cards to be submitted to support the Election Petition upon pain of losing their jobs. (See, Case No. 29 CA 197798, where Region 29 has shelved the Election Petition filed by 1010 due to serious involvement in and interference by NYP in the election process.)[9] (See Joint Exhibit 7)

The fact is that other than pouring concrete into the hole, and performance of a more sever cut back then required previously; there is no difference in the work performed historically by 175 in doing road

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[9] This analysis is also supported by Joint Exhibits 1B and 1C which are Memorandums in effect between NYP and 1010; which state that certain articles of the 1010 agreement are superseded by the terms of those Memorandums should 1010 become the exclusive collective bargaining representative, under either Section 8(f) or Section 9(a) of the NLRA of the employees *who primarily perform "asphalt paving."* Should that occur then the terms of the Memorandum would become effective. And the 1010 agreement would automatically cover 175's jurisdiction. Thus, 1010 filed a petition for an election in April, 2017 at Case No. 29 RC 197886 for the exact unit that 175 was certified for with the aid of NYP in violation of Section 8(a)(2) of the Act. See, Case No. 29 CA 197798.